

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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JAYME GORDON,
Plaintiff,

vs.

DREAMWORKS ANIMATION SKG,
INC., et al
Defendants.

* * * * *

CIVIL ACTION
No. 11-10255-JLT

BEFORE THE HONORABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
HEARING

A P P E A R A N C E S

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Courtroom No. 22
John J. Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
November 17, 2011
11:20 a.m.

APPEARANCES, CONTINUED

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P R O C E E D I N G S

THE CLERK: All rise for the Honorable Court.

THE COURT: Good morning, Everybody.

VOICES: Good morning, Your Honor.

THE COURT: Sit down, please.

THE CLERK: This is civil action No. 11-10255,
Jayme Gordon versus DreamWorks Animation.

Counsel please identify themselves for the record.

MS. BROOKS: Good morning, Your Honor. Juanita
Brooks, Kristen McCallion and Greg Madera from Fish &
Richardson and Mr. Fisher from Duane Morris on behalf of
Jayme Gordon, the plaintiff.

THE COURT: Okay.

MR. ZAVIN: Good morning, Your Honor. Jonathan
Zavin of Loeb & Loeb and with me is John Shope and Julia
Huston of Foley Hoag for the defendant DreamWorks Animation.

THE COURT: Let me do it, awful to have to do,
apologize before I even start. Now, we can spend the next
ten minutes and I will tell you all about the construction
sites that caused me to be late.

(Laughter.)

THE COURT: But probably we could spend the time
better by getting down to business here.

I want to get this case on the tracks. I mean,
that is my purpose. And I understand from looking at the

1 papers, my limited understanding I should say, from looking
2 at the papers, because you people have a much better
3 understanding of the case than I do, one obstacle we have to
4 progress is the taking of the plaintiff's deposition. That
5 has to be done. You all know it has to be done. It is a
6 question of whether it is now or later.

7 And what I want to do is to make sure that in the
8 next few minutes we have a firm schedule for the setting of
9 that deposition. Now, what impediments to that you can
10 recite to me, I think there is some concern about an
11 investigation that was done and the propriety of it and
12 whether or not it should have some effect on the deposition.
13 Those are all things that I am happy to listen to you on
14 this morning.

15 I think I understand everything that happened and I
16 think I have an appreciation for the propriety of certain
17 pretrial investigation. But if there is something
18 extraordinary here, I want to hear you, I want to give you
19 an opportunity to be heard.

20 So who wants to go first and tell me, or shall I
21 just tell you I am going to give you a date for the taking
22 of the deposition and that is it, period, without any
23 further discussion?

24 **MS. BROOKS:** Your Honor, we would request to be
25 heard since there are other amenities we are also seeking

1 from the Court in addition to the protective order.

2 **THE COURT:** All right. Go ahead.

3 **MS. BROOKS:** Thank you.

4 Thank you very much, Your Honor.

5 The issue here isn't whether or not Mr. Gordon
6 needs to sit for his deposition. Of course he does. And he
7 was indeed scheduled to sit for his deposition on
8 October 19th.

9 What happened in the weeks leading up to his
10 deposition is that the defendants conducted an investigation
11 that was so heavy-handed and so extreme that it caused
12 Mr. Gordon and his family such, essentially harassment and
13 distress that when it came time to prepare Mr. Gordon for
14 his deposition, not only Mr. Gordon but frankly his entire
15 legal team were distracted by what was going on.

16 So just to quickly recap, Your Honor, what happened
17 here. Mr. Gordon has submitted a declaration under oath
18 which remains unrebutted by the defendants. At paragraph
19 three Mr. Gordon details how in mid to late September he
20 began noticing cars parked outside his apartment building on
21 almost a daily basis. The defendants' response to this has
22 been nothing.

23 Paragraph four of his declaration, on September
24 26th he was pursued in his car for about 20 minutes by
25 someone. Defendants' response to this, nothing.

1 Paragraph eight details the October 2nd encounter
2 that Mr. Gordon actually had with one of the cars that had
3 been staking out his house and following him, his wife, his
4 family. We've submitted to the Court a videotape, I hope
5 Your Honor was able to view it. We submitted it in an
6 electronic copy. What it is is Mr. Gordon and it details
7 what led up to this in his declaration at paragraph eight,
8 that he saw this same silver Lexus that had been staking him
9 out, amongst other cars, at a residence where Mr. Gordon and
10 his family were moving.

11 He sees that car there and then as he's leaving the
12 car now is following him back to his apartment building.
13 Mr. Gordon slows down to let the car pass. It doesn't pass
14 to the point with people are honking. After that it finally
15 does pass. And when Mr. Gordon gets back to his apartment
16 building, who is there but the gentleman in the silver Lexus
17 again.

18 Mr. Gordon, knowing that at this point his 16-year
19 old son is home alone, goes into a panic. Calls his son to
20 make sure that he's okay, tells him to lock the door, not
21 let anyone in and then yells at the person in the silver
22 Lexus, which he now has on tape, to stop so he can talk to
23 him and find out what is going on.

24 The person doesn't stop. Mr. Gordon follows him to
25 get his license plate number and that is all on tape. And,

1 indeed, that license plate number came back to a JC Lane and
2 Associates, a private investigation company.

3 Now, here defendants actually have an answer. What
4 their answer is is that Mr. Gordon attaches, quote, a brief
5 video purportedly filmed by Gordon which simply shows Gordon
6 chasing someone.

7 The defendants know exactly who it was. It was
8 their private investigator.

9 They then go on and say, The extremely brief and
10 likely highly edited video shows what purports to be the
11 plaintiff in pursuit of an investigator.

12 They know it isn't purporting. They know it is,
13 indeed, an investigator.

14 They then go on at page fifteen and say,
15 "Defendants' attorneys authorized an investigation to be
16 performed by a licensed investigation firm." Mr. Shope then
17 says in his under-oath declaration at paragraph 14, "I took
18 charge of supervising the investigation. We retained the
19 investigative division of Marcum LLP."

20 Paragraph 15 of his under-oath declaration, "I
21 specifically instructed Marcum to conduct and otherwise
22 obtain information by lawful means only."

23 He makes no mention whatsoever of JC Lane and
24 Associates. Who are they? Who hired them? What
25 instructions were they given? How can defendants make a

1 representation that the surveillance of Mr. Gordon was done
2 in a proper fashion when they never even tell us who JC Lane
3 and Associates are, who hired them and what instructions
4 they were given?

5 In fact, in their motion to dismiss, they say,
6 "This background check included minimal legal and
7 nonintrusive observation of plaintiff."

8 Again, what is their basis of that, for that, when
9 they have yet to this day to tell us who hired JC Lane and
10 Associates and what instructions they were given.

11 We submit, Your Honor, and one of the reasons why
12 we are asking the Court to order them to turn over all
13 instructions to any investigation firms that they hired and
14 all reports from those investigation firms is because we
15 believe that JC Lane and Associates was instructed to make
16 sure Mr. Gordon knew that he was being followed and to make
17 sure that he was put in fear not only for himself but for
18 his family.

19 Now, why is that the case? Because, as we say in
20 our papers, a quick Internet search of the background of
21 Jayme Gordon will turn up two things. One, it will turn up
22 this lawsuit.

23 Two, it will turn up something that happened back
24 in 1993 to Mr. Gordon and his family. Mr. Gordon's sister,
25 Patricia Aquino, was brutally murdered in front of their

1 three-year old son by her husband. Her lifeless body was
2 found the next day by her teenage daughter with her
3 three-year old son still present in the house. Mr. Gordon
4 was there, called to the scene, allowed to hug and kiss his
5 sister's lifeless body goodbye as a butcher knife was still
6 embedded in her chest as her body was carried out of the
7 house.

8 We fast forward now to when the murderer of
9 Mr. Gordon's sister was arraigned. And when Mr. Gordon saw
10 him, saw the picture of his sister that his mother had
11 brought to court so that she would be more than just a name
12 on a docket, and the attitude of the murderer as he was
13 brought past Mr. Gordon and his mother, Mr. Gordon snapped.
14 And that is the assault conviction, by the way, that
15 defendants talk about, is that Mr. Gordon, indeed, assaulted
16 the murderer of his sister in court.

17 The defendants know this by a quick Internet
18 search. They know his Achilles' heel. They know his hot
19 button and they set out to get a message to Jayme Gordon to
20 either, one, get him to snap yet again and get him on tape
21 saying, look, this guy is a crazy man, how can he have a
22 legitimate case, or get him to say I can't do this to my
23 family, I'm dropping this suit.

24 And that is exactly what was going on here. And
25 the defendants have yet to deny it. They have yet to even

1 admit that they hired JC Lane and Associates in the first
2 place.

3 We go to paragraph six of Mr. Gordon's declaration.
4 Investigators somehow obtained entry into Mr. Gordon's
5 locked apartment building. Defendants do not deny that nor
6 do they explain to this Court how it is they got into that
7 locked apartment building.

8 They then questioned Mr. Gordon's neighbors. We
9 attached the declarations from the neighbors. One was a
10 minor child who was home alone without the presence of his
11 parents and questioned by these investigators without the
12 permission of his parents. That is absolutely unethical and
13 against the law.

14 The others who were questioned, the other
15 neighbors, were led to believe that Mr. Gordon was being
16 investigated because he had done something wrong. What is
17 the defendants' response to this? That the conversations
18 with the neighbors were voluntary and that nobody was lied
19 to.

20 That is absolutely not true. They were led to
21 believe that they were living in an apartment building where
22 there was a man present who had done something that caused
23 him to get investigated. And there is no disclosure by
24 whoever these investigators are, what investigation company
25 they were working for and what instructions they were given.

1 What possible purpose was there behind getting investigators
2 to go into Mr. Gordon's locked apartment building and
3 question neighbors other than to make Mr. Gordon --

4 **THE COURT:** I take it they didn't go into the
5 living quarters itself, it was the main door; is that it?

6 **MS. BROOKS:** They went into -- actually, no, they
7 went into the apartment building, knocked on neighbors'
8 doors and talked to neighbors in their living quarters.

9 **THE COURT:** I understand, but the "investigators"
10 didn't go into the plaintiff's residence itself?

11 **MS. BROOKS:** Correct, Your Honor, they did not go
12 into his apartment.

13 **THE COURT:** It is the outdoor access that you are
14 talking about?

15 **MS. BROOKS:** Correct, Your Honor. Yes, I'm sorry.
16 The locked door I'm talking about is the door into the
17 apartment building itself. It is locked. It is in
18 Dorchester. It is not locked because it's posh and has a
19 doorman. It's locked because it is, you know, in a fairly
20 tough neighborhood and it's locked for security purposes.
21 And you can't get in unless you have a key.

22 And there is no explanation to this day from the
23 defendants how these investigators got inside that apartment
24 building.

25 What was the purpose behind it? To make Mr. Gordon

1 know he wasn't even safe in his own home. Neither was his
2 family.

3 What's the next paragraph? Paragraph nine,
4 Mr. Gordon says he's been informed that investigators
5 obtained entry into his mother's locked apartment building
6 and questioned neighbors. Defendants' response to that, not
7 one word. They don't even deny that it happened nor explain
8 what business they had going into his mother's locked
9 apartment building and questioning neighbors.

10 I can tell the Court the logical reason they did it
11 is that Mr. Gordon's mother is the woman who was sitting in
12 court with the photo of her daughter who was murdered by her
13 husband. Mr. Gordon's nephew David Gordon was the little
14 boy that witnessed the murder of his mother.

15 Later what happened is that the murderer sued for
16 custody of the children so that his sister could bring them
17 to visit him in prison where he was doing life without
18 parole. That was a whole other saga that the Gordons had to
19 go through.

20 David Gordon, who is now 18 years old, lives with
21 Mr. Gordon's mother. That little boy spent months sleeping
22 under his bed after he witnessed the murder of his mother by
23 his father. Defendants know it because it's in the
24 newspaper articles that are in the public record and yet
25 they send investigators into his mother's locked apartment

1 building to terrorize them also.

2 And they also happen to know because we produced it
3 in discovery that Mr. Gordon's mother had written a letter
4 and Mr. Gordon's nephew David, who is now 18, had written a
5 letter talking about all the artwork that Mr. Gordon had
6 done throughout his life and how David Gordon even used to
7 when he was a little boy have Uncle Jayme's artwork on the
8 wall.

9 They went there to try to get these people also
10 scared off and for them to tell Mr. Gordon, which is exactly
11 what they did, they were terrified, and to get Mr. Gordon to
12 drop this case.

13 And they knew of his vulnerability when they did
14 these actions and they have yet to explain them.

15 They also haven't explained who are these women.
16 They didn't identify themselves from any private
17 investigation agency. They just said they were doing a
18 check. They admitted, defendants admitted in a letter that
19 there were, their words, conversations with Mr. Gordon's
20 neighbors that ceased on October 2nd.

21 October 2nd, by the way, Your Honor, was the day
22 that Mr. Gordon followed JC Lane and Associates in his car
23 and got the guy's license plate number. It's no coincidence
24 that they then decided to call off, at least for the time
25 being, these strong-arm tactics.

1 But it doesn't end there. That alone is simply
2 wrong and in violation of the Witness Intimidation Statute
3 in this state. The statute reads very clearly that anyone
4 who misleads, intimidates or harasses another person and
5 that person is furthering a civil proceeding or is a person
6 who was attending or had made known his intention to attend
7 a civil proceeding is guilty of violating the statute.

8 The term "harass" shall mean to engage in any act
9 directed at a specific person or persons which act seriously
10 alarms or annoys such person or persons and would cause a
11 reasonable person to suffer substantial emotional distress.

12 That's exactly what happened in this case. This
13 statute was amended in November of 2010 to apply to civil
14 cases. It didn't use to. It used to only apply to criminal
15 cases. It was amended in 2010 to apply to civil cases and
16 also to apply not just to intentional behavior but to
17 reckless disregard, which at a minimum is what happened
18 here, although we submit it was intentional behavior.

19 Now, we are not here today to ask that anybody be
20 indicted. But certainly if you're in violation of the
21 Massachusetts Witness Intimidation law, then your
22 investigation has gone too far and it is improper and there
23 must be some ramifications to that.

24 That's that part of their behavior. Let's turn to
25 the second part. The second part is detailed in paragraph

1 ten of Mr. Gordon's letter. A David Allen who Mr. Gordon
2 hadn't worked for in 18 years was questioned by a private
3 investigator at his home in Burbank, California. Mr. Gordon
4 had worked for Mr. Allen 18 years earlier at the Warner
5 Brothers Store in Braintree, Massachusetts.

6 Now, 18 years later a gentleman shows up at David
7 Allen's home in Burbank, California, identifies himself as
8 being from Thomas Dale and Associates. If you go on the
9 website, you'll find Thomas Dale and Associates is a private
10 investigation firm. No mention by the defendants who hired
11 Thomas Dale and Associates. What instructions were they
12 given? Why were they there?

13 And this gentleman, David Allen, says in the email
14 to Mr. Gordon, which is attached to our papers, that it was
15 only after this gentleman left that Mr. Allen on his own
16 Googled Mr. Gordon's name and saw the *Kung Fu Panda* lawsuit
17 so he had up until that point no reason to know that this
18 gentleman was there because DreamWorks was looking into
19 Mr. Gordon's allegations. At best there was an omission.
20 At worst he was deliberately misled.

21 But we do have affidavits from people who affirm
22 under oath they were absolutely deliberately misled. Joe
23 Martinez gave an affidavit, and Mr. Gordon details it at
24 paragraph 12 but it is also attached to our moving papers,
25 to our reply, to our motion for a protective order.

1 Mr. Martinez specifically says that based on the
2 questioning of the private investigator, her questions left
3 him with the impression that Jayme Gordon had applied for a
4 new job --

5 **THE COURT:** "Her questions," you mean the
6 investigator's?

7 **MS. BROOKS:** Yes, Your Honor, the investigator's
8 questions left Mr. Martinez with the impression that
9 Mr. Gordon had applied for a new job and the woman calling
10 was seeking references for his prospective employer.

11 Now, Massachusetts Rule of Professional Conduct, I
12 believe it is 4.3, says that a lawyer shall not state or
13 imply that the lawyer is disinterested in talking to a third
14 party. This case, this rule has further been expanded upon
15 in the In Re: Crossen case. Mr. Crossen was a partner at
16 Foley & Hoag. He was disbarred in 2008. His disbarment was
17 taken all the way up to the Massachusetts Supreme Court. He
18 argued that he was simply zealously representing or
19 defending his client. He was an attorney in what is
20 somewhat notorious here in Massachusetts, the Demoulas v.
21 Demoulas litigation that went on for a decade.

22 What Mr. Crossen did was hire private investigators
23 to perpetuate a ruse where they pretended to be looking to
24 give a job to the judge's, who was presiding over the
25 Demoulas litigation, to that judge's former law clerk. They

1 pretended to be potential employers and they interviewed
2 that law clerk on numerous occasions under the ruse of being
3 potential employers but in actuality trying to get that law
4 clerk to say things that they could use to disqualify the
5 presiding judge.

6 That in addition to some other behavior resulted in
7 the disbarment of Mr. Crossen. And the Crossen case held
8 that a lawyer cannot use agents like investigators to do
9 what the lawyer himself could not do. Since Mr. Crossen
10 would not be allowed under Rule 4.3 to pretend or imply to a
11 third party that he was disinterested, he can't use an
12 investigator to do that.

13 That is exactly what the defendants have done in
14 this case. And they ought to know about the In Re: Crossen
15 case, he was their former law partner.

16 In addition to that, they misled not only
17 Mr. Martinez, which we have a declaration to that effect,
18 but Derek Tuttle, which we also have a declaration. Derek
19 Tuttle says that he received a call from a woman seeking a
20 character reference for Jayme Gordon. She said she was
21 calling from Marcum.

22 Now, defendants make much of the fact that Marcum
23 has been identified and that it is their private
24 investigation firm. If one goes online and looks up Marcum
25 LLP, it's actually identified as an accounting firm. You

1 can't even tell from their website that they do private
2 investigation, at least from the home page.

3 She left Mr. Tuttle, and this is what Mr. Tuttle
4 says under oath, "with the impression that she was Jayme's
5 lawyer and that Marcum was the law firm representing Jayme."
6 Defendants' response, no denial. Simply to say we hired
7 Marcum, we told them not to do anything illegal. That is
8 simply not good enough under the law in this district.

9 What is interesting and what is conspicuously
10 absent from all of defendants' papers is any declarations
11 from the private investigation companies. What instructions
12 were they actually given? What questions did they actually
13 ask? How did they obtain entry into locked apartment
14 buildings? Why did they obtain entry into locked apartment
15 buildings? Why were they surveilling Mr. Gordon, not just
16 on a routine basis as defendants characterize it, but
17 actually chasing him for twenty minutes at a time, popping
18 up everywhere he was?

19 Why did they gain entry into the locked apartment
20 building of Mr. Gordon's mother? What did they hope to
21 accomplish there?

22 Not one word from one private investigator in this
23 case under oath nor even a mention by the defendants of at
24 least two of the three private investigation companies that
25 we've been able to identify.

1 That is not where it began though, Your Honor. It
2 began actually back after we filed this lawsuit. We filed
3 this lawsuit in February. Now, what's interesting is that
4 the defendants' heavy-handed investigation did not start
5 until September, a few weeks before Mr. Gordon was to sit
6 for his deposition.

7 Why would they not have done a background check on
8 Mr. Gordon when this case was first filed? What possible
9 purpose could it serve to crank up the heat and make him
10 feel like he was surrounded merely weeks before his
11 deposition? To do exactly what they did: Distract him,
12 distress him, and eventually cause us to have to postpone
13 his deposition until we could seek a protective order from
14 the Court and put an end to this kind of behavior.

15 But their actual case began, this type of campaign
16 began in March after we filed the case. We have attached,
17 Your Honor, to our moving papers a letter from Mr. Zavin
18 where he says let's have a meeting and, by the way, it is
19 not a settlement meeting, he says, because we're not
20 settling, we're not giving you a dime. But we want to show
21 you some things to convince you that you do not want to
22 pursue this case.

23 One of the things that they showed at that meeting
24 was a letter that they claimed was from DreamWorks to
25 Mr. Gordon. It even had Jayme Gordon's name on there. It

1 was even addressed to a Jayme Gordon at a P.O. box.

2 And in that letter it said that his submission to
3 DreamWorks was being returned unread. When we got discovery
4 from defendants, that letter was conspicuously absent. We
5 wrote to them, and that's also in our moving papers, and
6 said can we please have the letter. They wrote back, and
7 Mr. Grossman, it's Exhibit D to Ms. McCallion's declaration,
8 Mr. Grossman wrote back and said, oh, we never said we have
9 that letter. We said the letter is an example of what it
10 may have looked like and that this example incorporated the
11 electronic data which was received relating to the rejection
12 and return of Mr. Gordon's submission.

13 We were then fortunate enough, because Mr. Gordon
14 has paper everywhere, we were actually fortunate enough to
15 find the actual rejection letter from DreamWorks. We
16 produced it to defendants. That letter says not a word
17 about his submission being returned.

18 Now defendants have done a 180 and are telling this
19 Court that that letter is a true and correct copy of the
20 actual rejection letter and that that letter at page six of
21 their brief the defendants say indicates that no material
22 was actually sent to DreamWorks. It is frankly unbelievable
23 the misrepresentations that have been repeatedly made.

24 But what happened is essentially when DreamWorks
25 wasn't able to convince counsel that this case didn't have

1 merit, because it does, they then began their campaign of
2 attempting to scare off Mr. Gordon and prevent him from
3 wanting to go forward with this lawsuit.

4 Now, I have one more area that I would like to
5 cover very briefly, Your Honor, because it is the character
6 assassination that is taking place by DreamWorks.

7 Your Honor issued an order granting our motion for
8 a protective order and saying that Mr. Gordon's deposition
9 shall not go forward until we have this hearing. One hour
10 after Your Honor issued that order the defendants filed a
11 motion to dismiss. It made no sense at the time why they
12 were doing that since Your Honor had already issued the
13 order. It did once we read what their motion to dismiss
14 contained.

15 What it contained wasn't any response to what we
16 had said they had done. And to this day they haven't
17 responded to it. What it contained was the beginning of the
18 character assassination of Mr. Gordon and the attempt to
19 poison this jury pool.

20 This (indicating) is paragraph 12 of the
21 declaration of Mr. Shope. Mr. Shope details -- let's see if
22 we can get this to focus. There we are.

23 Mr. Shope details in this paragraph what he says is
24 a litany of the bad acts of Mr. Gordon. He says, "In the
25 meantime, a review of public records showed, among other

1 things" -- oh, and, Your Honor, may I approach? I have a
2 hard copy for the Court.

3 **THE COURT:** Oh, okay. I can look at this too.

4 **MS. BROOKS:** Whichever the Court would prefer, Your
5 Honor. We do have a copy for you.

6 **THE COURT:** All right. Thank you very much.

7 (Whereupon, a document was handed to the Court.)

8 **THE COURT:** Go ahead, please.

9 **MS. BROOKS:** And, Your Honor, it says, "In the
10 meantime, a review of the public records showed, among other
11 things."

12 Now, what's interesting is there were no public
13 records attached to this declaration. And I actually
14 thought to myself how odd that you would refer to public
15 records and yet not attach them. Wouldn't you want the
16 Court to see what the public records showed that you claim
17 they showed?

18 I got the answer once we got ahold of the public
19 records. The answer is they're not attached because they
20 actually don't show what the defendants claim they showed.

21 The first is this: They say the public record
22 shows that Mr. Gordon has a criminal conviction for assault.
23 First of all, that goes to no issue in this case. It does
24 not go to his truthfulness. This has nothing to do with the
25 conviction for fraud or deceit.

1 However, here's what the criminal conviction for
2 assault came from. This (indicating) is the newspaper
3 article detailing what happened in court the day that the
4 murderer of Mr. Gordon's sister was brought in. It says, "A
5 Quincy man waiting to be arraigned for allegedly murdering
6 the mother of his two children was attacked by the victim's
7 distraught brother in a busy Suffolk County courtroom
8 yesterday."

9 It goes on, "Taken out of the courtroom in
10 handcuffs, Gordon was later arraigned in Boston Municipal
11 Court on charges of assault and battery with a dangerous
12 weapon, shod feet," meaning he kicked him and he had shoes
13 on. "He was released on personal recognizance."

14 It then gives the explanation from Mr. Gordon.
15 "Trying to explain the attack, Gordon said in an interview
16 that when he glimpsed a photograph of his 33-year old
17 sister, Patricia Aquino Gordon, which his mother had brought
18 to Murphy's arraignment, he flashed back to August 1st when
19 her body was discovered in her Dorchester apartment. Gordon
20 said that day that he and other family members were allowed
21 to kiss, hug and say goodbye to his sister in a hallway of
22 the apartment before her lifeless body, a knife still
23 embedded in her chest, was carried out. 'It still hurts,'
24 said Gordon, who composed poems to his sister's memory that
25 the family distributed in the courtroom."

1 This was the conviction for assault. This is the
2 context in which it was made. Defendants well knew it and
3 yet didn't bother to tell the Court about it.

4 It went on. This is back to Mr. Shope's paragraph
5 12. It says, again referring to Mr. Gordon, "that he had
6 been the subject of a restraining order." Again, irrelevant
7 to the issues in this case.

8 But here's the restraining order (indicating). The
9 murderer of Mr. Gordon's sister sued Mr. Gordon for
10 attacking him in the courtroom. In this lawsuit the
11 murderer, Robert Murphy, versus Jayme Gordon, brought a
12 motion for a restraining order saying, "This defendant did
13 attack me in open court and try to kill me."

14 He didn't really need a restraining order, he was
15 doing life in prison without parole at that point but he
16 filed a bevy of papers. Again, the defendants deliberately
17 don't tell Your Honor the context in which this was done to
18 put it in the accurate light.

19 Next they say -- and this could go to Mr. Gordon's
20 reputation for honesty, that he had been sued for failure to
21 pay a credit card debt. What they don't tell Your Honor is
22 that Mr. Gordon responded to that suit saying, "I have no
23 knowledge of the account you mentioned and do not owe the
24 money requested by you."

25 What the court then ordered, Mr. Gordon moved to

1 dismiss the lawsuit and the court on slide 11 says, it's
2 hard to read but it says, "Documents to be provided by
3 July 31, 2009 substantiating all credit card transactions,
4 payments and outgoing balances or case will be dismissed."
5 Meaning the credit card company had to come up with
6 documentation or the court was going to dismiss the case.

7 In fact, they didn't come up with the documentation
8 because it wasn't Mr. Gordon's card and the case was
9 dismissed. The defendants don't tell Your Honor that.

10 Next, they say, again, paragraph 12, that
11 Mr. Gordon "made claims for a personal injury (loss of
12 hearing) but resisted an independent medical examination
13 with a Superior Court judge ruling that his case was not
14 likely to succeed on the merits."

15 Your Honor, this is probably the most insidious
16 one. If you read just that, I assume what Your Honor came
17 away with was the conclusion Mr. Gordon had made a claim for
18 work-related injuries. When they said, well, you need to
19 have some medical exams to support it, he refused and that
20 the Superior Court judge had ruled that his case was not
21 likely to succeed on the merits. That was an absolute
22 deliberate misrepresentation by the defendants in an
23 under-oath declaration because here's what the actual public
24 records show.

25 They show that Mr. Gordon, indeed, was injured on

1 March 17, 2000 by an explosion involving some pyrotechnics
2 while he worked at the Fleet Center in Boston. He was taken
3 to the emergency room where he was treated and subsequently
4 diagnosed as suffering from barotrauma which caused him to
5 have vertigo and be unable to climb up high ladders and be a
6 stagehand anymore.

7 Then in paragraphs four through -- and I'll go
8 through these quickly, Your Honor, rather than putting them
9 all on the ELMO. Indeed, in December of '04 the defendants
10 wanted Mr. Gordon, the defendants in this case wanted
11 Mr. Gordon to go through a whole series of tests. And
12 Mr. Gordon lists them in paragraphs four through eight of
13 his declaration in that case.

14 And what he says is I have already undergone these
15 tests. My doctor gave me these tests. The Worker's Comp.
16 doctor gave me these tests. Some of these tests, they spin
17 you around, I get so nauseous I throw up. I don't think I
18 need, therefore, to undergo any more independent tests since
19 I have already undergone independent tests. And that is
20 specifically what he says at paragraph 10 of his
21 declaration.

22 This is in December of '04. What happens is --
23 and, again, the defendants don't say a word about this to
24 Your Honor. They say with a Superior Court judge ruling
25 that his claim was not likely to succeed on the merits,

1 here's how this case ended.

2 After hearing allowed on June 5th, 29 (sic), this
3 petition for approval of settlement was allowed by the
4 court.

5 The case that the defendants would have the Court
6 believe was so meritless that the judge found no likelihood
7 of success on the merits was settled for \$285,000, because
8 Mr. Gordon, indeed, had been permanently injured as a result
9 of the explosion that occurred right next to his ear.

10 So where did the defendants get these words, "with
11 a Superior Court judge ruling that his claim was not likely
12 to succeed on the merits"? They get it from something the
13 judge wrote in the margin eight months earlier.

14 Originally Mr. Gordon's lawyer asked for an
15 attachment of real estate in case they got a large judgment.
16 And the judge simply wrote in the margin, "The Court is not
17 persuaded that, at this stage," which was early on in the
18 case, "the plaintiff has a likelihood of succes on the
19 merits."

20 In other words, I am not going to give you your
21 preliminary injunction at this point in time. That's all
22 the Court said. But the defendants couple it with
23 Mr. Gordon supposedly refusing an independent medical exam,
24 thereby leaving this Court and the public and the jury pool
25 with the impression that Mr. Gordon is a scam artist and

1 that this was a scam. And, in fact, they call him a scam
2 artist in their moving papers.

3 Now, just one more claim they make. They say that
4 Mr. Gordon made a claim for accidental damage to his vehicle
5 for which he lacked documentation and that an adjustor
6 considered inflated by a factor of almost ten.

7 Let's look at what the actual public records show.
8 What the public records show is that Mr. Gordon submitted,
9 indeed, that his car was damaged by a Bobcat front loader.
10 Mr. Gordon submitted to their insurance carrier a claim.
11 Attached to the claim as Exhibit A was a police report. So
12 much for no documentation.

13 Attached as Exhibit B was a copy of an estimate
14 that Mr. Gordon had received. That estimate -- so
15 defendants are saying "for which he lacked documentation."
16 The estimate which is at slide 25, Your Honor, is from a
17 company called the Collision Center. It itemizes over two
18 pages long all the damage to Mr. Gordon's car and the fact
19 that it was at least \$6300 worth of damage.

20 Then they say, "And that an adjustor considered
21 inflated by a factor of ten." That's not at all what
22 happened. What happened as we detail on slide 26, right out
23 of the public records. "According to my client," this is
24 Mr. Gordon's lawyer talking, "AIG sent him a check for
25 \$701.90 as a proposed amount to satisfy his claim. Because

1 the estimate to repair the damage to the vehicle was \$6,593,
2 Mr. Gordon did not cash the check. As of this date, the
3 vehicle has not been repaired."

4 Mr. Gordon's attorney then said that their offer --
5 there was no adjustor saying that Mr. Gordon's claim was
6 inflated. What they were trying to do was what insurance
7 companies do all the time. They send the insured a check
8 and in fine print it says cashing of this check is
9 settlement in full.

10 Well, Mr. Gordon didn't do it. And so the
11 adjustor -- sorry -- the attorney says, "Your offer to pay
12 \$701 to satisfy a claim for damage that will require more
13 than \$6,000 to repair is the type of deceptive act that is
14 in violation of," and then it cites Massachusetts law.

15 Defendants tell Your Honor none of this.
16 Defendants tell the public none of this. They do it for one
17 reason and one reason only: To taint the Court and taint
18 the jury pool and have everyone believe that Mr. Gordon is a
19 scam artist, as they call him, which is absolutely not true.

20 One more area, Your Honor, and I am finished.
21 Defendants have claimed that we, the attorneys -- they don't
22 stop their character assassination with Mr. Gordon -- that
23 we, the attorneys, have doctored documents in order to make
24 this case appear to have merit when it does not.

25 This (indicating), Your Honor, at slide 29 is a

1 comparison that we put in our complaint. On the left side
2 is the drawing made by Mr. Gordon of the large regular panda
3 and the small red panda. It is dated in 1993. To the right
4 is an image we got right off the Internet of publicity for
5 *Kung Fu Panda*.

6 Now, until this case I didn't even know there was
7 such a thing as a red panda; but DreamWorks would have you
8 believe that somehow they all on their own, without any
9 submission from Mr. Gordon, which, by the way, they now
10 admit he did make a submission -- well, he sent something to
11 Jeffrey Katzenberg, the CEO of DreamWorks, in October of
12 1999. *Kung Fu Panda* didn't come out until 2008.

13 So we've got the large Kung Fu Panda, fighting
14 panda, and the small red panda as his sidekick. And all we
15 were trying to show, Your Honor, was the striking similarity
16 between Mr. Gordon's figures. And it's not confined to this
17 drawing. We have put in our complaint and we have turned
18 over to defendants voluminous drawings involving these two
19 panda figures.

20 Now, what defendants complain of is that the actual
21 shot on the Internet also contained background characters
22 (indicating), five of them. And defendants are claiming
23 that by removing these five, we doctored, deliberately
24 doctored the image.

25 In no way did we change whatsoever the image of

1 what we were trying to compare which was the large panda and
2 the little red panda. The images are identical. We simply
3 removed the background so that one could focus on the two
4 pandas that we were focusing on.

5 We had no bad motive for removing the background
6 because, frankly, the background is also part of our case.

7 Here (indicating), for example, Your Honor, in the
8 background, and I'll let this auto focus, this background
9 figure right here (indicating), this is the Praying Mantis
10 that is one of the *Furious Five* in the DreamWorks *Kung Fu*
11 *Panda*. We've blown it up right here (indicating). This is
12 the exact figure (indicating).

13 Up in the upper left-hand corner, Your Honor,
14 that's Mr. Gordon's work. That's called a "Karate Marty
15 Mantis" which he registered with the Copyright and Trademark
16 Office in 2000, eight years before the DreamWorks movie came
17 out. There we have the Praying Mantis out of the DreamWorks
18 movie and here (indicating) we have Mr. Gordon's "Karate
19 Marty Mantis" copyrighted in 2000.

20 There was no reason for us to remove what is
21 actually more characters that DreamWorks has copied in this
22 case and they're a subject of this case other than to focus
23 on these two figures.

24 In sum, Your Honor, here's what we are asking for.
25 We are asking the Court to issue a protective order --

1 **THE COURT:** I will tell you what, defer the "in
2 sum." I am going to take a five-minute recess and you can
3 all share in that time, all right.

4 **MS. BROOKS:** Thank you, Your Honor.

5 **THE CLERK:** Court is in recess.
6

7 (Recess.)
8

9 **THE CLERK:** All rise for the Honorable Court.

10 **THE COURT:** All right. Sit down, everybody.

11 (Pause in proceedings.)

12 **THE CLERK:** Everybody is back? Okay.

13 Court is in session.

14 **THE COURT:** Just as an aside, in my court any time
15 anybody needs a recess, all you have to do is raise your
16 hand and the Court will recognize you. We don't have any
17 formal occasion for recesses.

18 **MS. BROOKS:** Thank you, Your Honor.

19 **THE COURT:** Now, you were saying, "in sum."

20 **MS. BROOKS:** Yes, Your Honor.

21 The remedies that we seek are detailed at pages
22 eight and nine of our original motion for a protective
23 order.

24 First is we are asking an order from this Court
25 requiring defendants and their counsel and their agents to

1 cease all of their surveillance, harassment and
2 investigation of Mr. Gordon, his family, his friends, his
3 acquaintances.

4 Defendants respond that, well, they told us that
5 they had ceased on October 2nd. The only thing they said to
6 us was in a letter that the conversations with neighbors had
7 ceased on October 2nd and the surveillance of Mr. Gordon had
8 ceased on October 2nd. We know that the rest of the
9 investigation, including the misleading of witnesses,
10 potential witnesses, continued well after October 2nd. And
11 they also said, And they had no plans at the present time to
12 resume the surveillance and the questioning or conversations
13 with neighbors, as they call it. So, again we have no
14 assurances from them whatsoever.

15 The second thing we're asking for, Your Honor, is
16 what we asked the defendants in our original letter that
17 started this whole thing: An order from this Court
18 requiring the defendants to disclose the identity of all the
19 investigators retained by their defendants, an order from
20 this Court requiring the defendants to produce to counsel
21 all copies of notes, reports, photographs, et cetera, that
22 were taken and to produce the instructions provided by
23 defendants or their counsel to every individual retained to
24 investigate or conduct surveillance.

25 Why is that necessary? Because, No. one, we only

1 know from the people that we've heard from. We have no idea
2 how many other people they have gone out there and misled.

3 We also need this now because counsel has made
4 affirmative representations under oath as to instructions
5 they supposedly gave investigators. They remain
6 conspicuously silent about JC Lane and Associates and Thomas
7 Dale and Associates so we don't know who hired them or what
8 was ever said to them.

9 We asked for this in our initial letters. So just
10 to put things back in perspective very quickly, Your Honor,
11 we wrote to counsel the Friday before Mr. Gordon's
12 deposition was to take place. We asked them to cease all
13 activities. We asked them to disclose who they hired and
14 what instructions they gave them.

15 We got back from them a letter that said that
16 Mr. Gordon should hardly be surprised that he is being --
17 and we also explained how distressed Mr. Gordon and his
18 family were as a result of this. We got back a letter from,
19 the first letter from DreamWorks saying he should hardly be
20 surprised that he is the subject of an investigation and
21 that DreamWorks reserves the right to do anything it deems
22 appropriate in order to defend their client.

23 What we explained in our motion, Your Honor, why we
24 had to file the motion for a protective order, DreamWorks
25 doesn't get to deem anything. That is up to Your Honor to

1 determine whether what they are doing is appropriate and is
2 proper or is unethical and illegal. That is up to the Court
3 to decide whether DreamWorks can or cannot continue their
4 activities. They don't get to deem anything just because
5 they're DreamWorks.

6 And so we are asking Your Honor to order them to
7 turn over who it was they hired, what instructions they were
8 given and what they got back in response. We also asked at
9 paragraph five of our original motion that the pro hac vice
10 of Mr. Zavin be revoked. We believed at that time because
11 Mr. Zavin had been writing the letters saying DreamWorks
12 deems, they'll do whatever they deem appropriate, that he
13 was behind hiring the private investigation firms.

14 Apparently he is not. We now have a declaration
15 from Mr. Shope saying that he was the one that hired the
16 firms, firm, and that he was the one that gave instructions.
17 So we withdraw that request about Mr. Zavin's pro hac.

18 We also ask an order from the Court --

19 **THE COURT:** You are withdrawing the request that it
20 be canceled?

21 **MS. BROOKS:** Yes, Your Honor.

22 **THE COURT:** Okay.

23 **MS. BROOKS:** We are.

24 We are also asking an order from this Court
25 permitting Mr. Gordon's counsel to offer evidence at trial

1 about the improper conduct of the defendants' attorneys.
2 And after we offer that evidence, we will be asking the
3 Court to give the jury an unfair inference instruction that
4 they can assume that they behaved in this fashion because
5 they did believe Mr. Gordon's case had merit and they wanted
6 to scare him off.

7 Now, such a request is not unprecedented in this
8 district, Your Honor. In the case of MIT versus ImClone at
9 440 F.Supp. 119, Judge Stearns issued just such an order.
10 In that case, and we are familiar with it because we were
11 actually, Fish & Richardson, representing MIT in that case.

12 In that case the actions of the defendants were
13 significantly less egregious than what has gone on here. In
14 that case what the defendants did was they contacted, their
15 in-house counsel contacted Merck, one of their distributors
16 of Erbitux -- it was a patent case -- contacted Merck and
17 asked Merck did they realize that one of their employees, a
18 Dr. Gillies, was working with us because Dr. Gillies was one
19 of the listed inventors on the patent. He had now left MIT
20 and was at Merck. And did they know that and had they given
21 him permission.

22 Dr. Gillies was then brought into his boss's
23 office, called on the carpet, told you can't do that. And
24 Dr. Gillies then says I'm sorry, I can't work with you any
25 more.

1 We came to Judge Stearns for a protective order.
2 They had essentially shuttered our witness, the witness who
3 would have the most knowledge of the facts of this case. As
4 a result of that and after hearing, an all-day evidentiary
5 hearing where Judge Stearns required in-house counsel from
6 ImClone to testify, outside counsel from ImClone to testify,
7 and then they had hired, ImClone had an ethics expert and a
8 couple of other people. We had an all-day hearing, at the
9 end of which Judge Stearns issued sanctions, allowed us to
10 introduce at trial the improper conduct of ImClone and said
11 he would consider giving an adverse inference instruction at
12 the time of trial.

13 So such a request is not only not unheard of in
14 this district but has actually been granted in this
15 district.

16 The case ended up settling the morning of trial,
17 probably in large part due to the fact that ImClone didn't
18 want to have to answer for its improper conduct in that
19 case.

20 So we are asking for the same thing here, Your
21 Honor. Otherwise, the message is going to be that if you're
22 DreamWorks and you're up against somebody like Jayme Gordon,
23 who was born and raised in South Boston and Dorchester, you
24 can do anything you want. You can get into his locked
25 apartment building. You can get into his mother's locked

1 apartment building. You can harass his neighbors. You can
2 lead people to believe he's done something wrong. You can
3 do a character assassination that is completely misleading
4 and improper in the papers. You can poison the jury pool.
5 And you can scare the living daylights out of him. And you
6 can get away with it because you're DreamWorks. And that
7 just can't be.

8 There is, one of sayings on this courthouse, Your
9 Honor, as we walk in is that everybody is equal in this
10 courtroom, that everybody has their right to their fair
11 chance and day in court. And that's all we're asking for
12 here, Your Honor.

13 **THE COURT:** Okay. Thank you.

14 **MR. ZAVIN:** Thank you, Your Honor.

15 Well, I'm pleased to hear that I am not being
16 kicked out of this courtroom. They're no longer asking for
17 my pro hac to be revoked.

18 Your Honor, Ms. Brooks made a number of points.
19 Let me try to address them seriatim.

20 There was a lot of hyperbole about this
21 investigation, how improper it was. Your Honor, rather than
22 merely my characterization, I invite you to look at the
23 declarations that plaintiff actually submitted from its, the
24 people who were supposedly harassed or misled. There is
25 nothing improper about this investigation. It was

1 absolutely routine and there is nothing in the declarations
2 that indicates otherwise.

3 Yes, two women went to Jayme Gordon's neighbors and
4 asked them about him. Nothing improper, nothing misleading.
5 What DreamWorks did is, yes, it looked at public records.
6 It talked to people who had known Jayme Gordon at various
7 times in his past, and for absolutely good reason.

8 Some of the issues in this case -- let me go back.

9 DreamWorks gets sued three years after a movie
10 comes out by a Mr. Gordon who claims suddenly that 10 years
11 earlier, 12 years earlier he created, he sent artwork to
12 DreamWorks.

13 DreamWorks knows a couple of things at this point.
14 One, having just gone through a trial in Los Angeles,
15 bizarrely on this exact same claim from a different
16 defendant, DreamWorks has absolutely knowledge of how this
17 movie was created.

18 The things that Mr. Gordon claimed were stolen from
19 him, copied, we know and there is evidence that's all been
20 turned over to the plaintiff here, that was created over a
21 period of four years by a dozen different people. There is
22 incredible evidence on the creation which is why we offered
23 to meet with them and show them this prior to this lawsuit
24 ever getting underway. That is No. one.

25 What DreamWorks also knows is even the complaint,

1 there is virtually no evidence of -- no claim of access.
2 The claims of access are bizarre.

3 The first claim is that somehow Mr. Gordon sent
4 something to Disney in the early '90s which Mr. Katzenberg,
5 who was the No. two at Disney, when he left Disney five
6 years later, stole from Disney, kept for eight years and
7 then used.

8 No evidence whatsoever. No evidence what was
9 submitted to Disney even.

10 Then there is the claim that something was
11 submitted to DreamWorks. DreamWorks has an elaborate system
12 to not look at all unsolicited submissions. There is a
13 claim that something was sent to DreamWorks but it gets more
14 bizarre. There is no evidence of even what was sent to
15 DreamWorks.

16 This is in 1999. The plaintiff, he claims he sent
17 something. We don't know what. We also know it was
18 rejected.

19 And then his third claim of access was, I had it on
20 the Internet. But when he produced his files on those on
21 the Internet, none of the stuff he claims was copied was
22 actually on the Internet.

23 What we then find out is the materials that he
24 claims were copied, much of them, were registered copyright
25 in 2008 and 2011. This was after the movie came out. The

1 problem is he seems to have discarded the computer on which
2 these were created.

3 Now, we said in our papers "threw away" and the
4 plaintiff took us to task and said, How can you say he threw
5 it away, he merely discarded it. But that's what happened.
6 I will adopt their word.

7 So what DreamWorks is looking at is a claim it
8 knows is absolutely nonsense. Now the question is who is
9 Jayme Gordon and what is this all about?

10 Yes, DreamWorks absolutely did a routine background
11 investigation on Mr. Gordon. An investigatory firm was
12 hired, a reputable one that is FBI and law enforcement
13 officers. They talked to neighbors. They were trying to
14 determine was this man an artist at all, how did --

15 **THE COURT:** Who is this JC Lane --

16 **MR. ZAVIN:** He was another investigator hired by a
17 subcontractor of the investigative -- of Marcum, Your Honor.
18 All of these were through Marcum. They're all ex-law
19 enforcement officers.

20 **THE COURT:** Okay. Go ahead.

21 **MR. ZAVIN:** And that's true in California also.

22 So there were no separate instructions given to
23 them. These were all subcontractors.

24 The defendant, the plaintiff rather is making a big
25 point that somehow we hadn't put in affidavits from

1 investigators as to exactly what was done. There are two
2 reasons for that.

3 One, it's absolutely not needed. If you read the
4 plaintiff's own declaration, there is nothing in those
5 declarations that shows that anything improper was done.
6 Not one single thing.

7 Secondly, what they haven't told you is there has
8 been correspondence from the plaintiffs to us within the
9 last two weeks saying you have to turn over all of your
10 reports because it's, even though it's work product, because
11 you have waived. And how have you waived? It's because you
12 discussed the reports. Even in Mr. Shope's affidavit,
13 merely by admitting there was an investigation, that's a
14 waiver of work product.

15 So what they're trying to do is say if you put in
16 the -- by not putting the application -- I'm sorry.

17 By not putting in the investigators' affidavits,
18 you're not rebutting what we said. However, if you put in
19 the investigators' affidavits, that's a waiver of work
20 product. That's exactly the game they're playing here.

21 In terms of -- and I'm loath to do this frankly,
22 given the tenor of this, but Ms. Brooks has made a big deal
23 about the convictions of Mr. Gordon and how inappropriate we
24 were to raise then.

25 One, they were only raised because, to explain why

1 the investigation was done. We didn't, DreamWorks didn't
2 voluntarily come into this court waving any of this. This
3 was all precipitated by plaintiff.

4 Two, in terms of misstatements in Mr. Shope's
5 declaration, I think unfortunately plaintiff is not aware of
6 all of the things in the public record about its own client.
7 For example, the restraining order that was discussed in
8 Mr. Shope's declaration is a different restraining order.

9 There are more than convictions that are outlined
10 in the declaration. And I don't want to go into them.

11 **THE COURT:** No, you better. I mean --

12 **MR. ZAVIN:** Okay, Your Honor. If I may.

13 If Your Honor will permit Mr. Shope, who is more
14 familiar with this material, he will detail exactly what is
15 in the public record.

16 **THE COURT:** Go ahead.

17 **MR. SHOPE:** Yes, Your Honor.

18 There has been a suggestion that was, merely this
19 attack related to a judicial proceeding involving
20 Mr. Gordon's late sister. That simply is not accurate.

21 Mr. Gordon has at least four convictions: Assault
22 with a dangerous or deadly weapon -- this is in addition to
23 the attack that was mentioned. So they're different,
24 assault with a dangerous and deadly weapon, convicted of
25 malicious -- willful and malicious destruction of personal

1 property. Convicted of cruelty to animals.

2 He was prosecuted on charge, multiple charges of
3 dealing in LSD. Those charges were dropped. They were
4 dropped around the same time that Mr. Gordon's probation on
5 an earlier conviction was revoked and he was sent to jail
6 for three months.

7 So this may not be admissible at trial. It may
8 ultimately not be relevant but the fact that as we were
9 looking at a claim that seemed very, very suspicious, and we
10 haven't even elaborated on the fact that he, quote,
11 discarded the computer that would permit us to determine
12 whether or not he had fabricated these drawings after the
13 fact, after learning about our movie. After he destroyed
14 what would have been critical evidence in the case, we
15 thought that it was important to find out who we were
16 dealing with.

17 And that view was strengthened as we looked into
18 Mr. Gordon and found out that he did have a criminal record
19 that was not a fleeting, youthful indiscretion but had
20 continued over time.

21 So, again, I don't think we need to decide today
22 whether any of that is going to come into evidence. But
23 there has been an attack, including an attack on me
24 personally, suggesting that I've committed a felony when I
25 have done what anybody I think would do who is a competent

1 attorney confronted with a claim that looks very suspicious.
2 And so what we needed to do was to find out who is this
3 person. Is he really an artist as they allege in the
4 complaint or is he somebody else?

5 As I said, there is a complaint in the plaintiff's
6 papers that we spoke to people that Mr. Gordon had dealt
7 with many years ago. Well, in fact, Mr. Gordon alleges that
8 he created the materials at issue many years ago so it's
9 very logical that we would contact those people, the people
10 who were working with him or knew him back at that time, and
11 try to find out the truth of the matter.

12 And I want to address in particular this suggestion
13 that the investigators committed misrepresentations. If you
14 look at the affidavits, and I urge you to do so, that have
15 been submitted by the other side, not a single one of those
16 affidavits actually states that there was a misstatement by
17 the investigator. There was a set of assumptions, every
18 single one of these says, I was under the impression, I was
19 under the impression that somebody was seeking a character
20 reference or something like that.

21 Someone being under the impression is very
22 different from there being a false statement made. So
23 obviously I wasn't there at every single investigation. I
24 could only give instructions to my investigators to do this
25 by the book. But there is absolutely not a scintilla of

1 evidence to suggest that this investigation was not done by
2 the book.

3 The only thing that has, that makes this at all
4 remarkable is that Mr. Gordon, perhaps because of his own
5 background, realized that he was being observed. And so
6 most people would have just gone back into the house and
7 refrained from being observed. He chose to pursue and to
8 take chase.

9 I think all of that has really nothing to do with
10 whether or not he needs to give a deposition in this case.

11 **THE COURT:** Thank you.

12 **MR. ZAVIN:** If I may, Your Honor, I would like to
13 refocus where Your Honor started this morning, which was on
14 Mr. Gordon's deposition.

15 We obviously have moved to dismiss this case based
16 on his failure to appear. We understand that's a drastic
17 remedy that is unlikely to be granted. We think the
18 appropriate remedy is to just immediately order his
19 deposition to be taken.

20 But counsel for plaintiff has claimed two different
21 things as to why this deposition didn't occur and it may
22 show light on what is going on in the courtroom now.

23 Mr. Gordon's deposition in Ms. Brooks', she said
24 Mr. Gordon was too upset, this investigation was all much
25 too upsetting to him and even their counsel, all eight of

1 them, couldn't concentrate on preparing for his deposition
2 because this observation of Mr. Gordon, which it sees weeks
3 ago, upset everyone too much.

4 In their reply, in papers submitted to the Court,
5 they say something quite different. They say, they didn't
6 -- Mr. Gordon's deposition was scheduled to go forward on I
7 believe a Wednesday. The Friday preceding that is when this
8 first erupted. They wrote a letter to me or to, plaintiffs'
9 counsel, saying what's going on with this investigation. We
10 said there is an investigation. Nothing improper is going
11 on. That was we thought the end of it.

12 What they're now saying, what they said in their
13 reply is, As detailed in plaintiff's opposition to
14 defendants' motion to dismiss, when plaintiff first raised
15 these issues with the defendants on October 14th there was
16 no mention of postponing Mr. Gordon's deposition, which was
17 then scheduled for October 19th. Plaintiff was simply
18 trying to get to the bottom of the extent of these
19 activities and to receive assurances from the defendants
20 that all such activities would cease.

21 So, therefore, what they've now said, what they
22 said on that, in their reply is they weren't that upset on
23 Friday that required canceling the deposition. They weren't
24 claiming on that Friday that the deposition couldn't go
25 forward. It's only when they saw an opportunity that

1 following Monday or Tuesday, the day before the deposition,
2 that for some reason they didn't want to take it or they
3 wanted to know what we had found out prior to the deposition
4 to try to protect their witness that this whole thing
5 erupted.

6 Mr. Gordon was apparently not that upset on the
7 Friday before his deposition that he couldn't have taken it.
8 They went on to say, It was only after defendants'
9 noncommittal response we received on October 17th wherein
10 defense counsel refuses to disclose the extent of these
11 activities and reserved the right to take any action that
12 they deemed appropriate in representing their clients did it
13 become imperative to seek a protective order from the court
14 before allowing Mr. Gordon's deposition to go forward.

15 That is directly contrary to Mr. Gordon's
16 declaration and it's directly contrary to what Ms. Brooks
17 just told the Court as to why that deposition was canceled.

18 Your Honor, I don't think, I am not going to try to
19 relitigate a personal injury case that Ms. Brooks was
20 apparently referring to. I'm not going to try to relitigate
21 various other cases. I simply suggest that, as Your Honor
22 stated, this case should be put back on track. Mr. Gordon's
23 deposition should go forward. There is no basis for turning
24 over investigatory reports or work product of a completely
25 appropriate investigation, which is the other remedy that

1 she seeks.

2 And there is certainly no basis whatsoever for the
3 Court certainly now deciding what is going to be presented
4 to a jury in this case, if this case surprisingly ever gets
5 to a jury.

6 Thank you.

7 **THE COURT:** The prime issue that I am going to take
8 care of is to set a deposition date. When is it going to be
9 convenient for the deposition to take place?

10 There will be no continuances so pick your date
11 carefully.

12 **MS. BROOKS:** Your Honor, we would be available, we
13 would be available any time the 6th, 7th or 8th of December
14 or the 14th or 15th of December.

15 **THE COURT:** Let me ask you, how long do you
16 anticipate it would take to do the deposition?

17 **MS. BROOKS:** I would assume, Your Honor, that
18 they're limited to the seven hours.

19 **THE COURT:** Well, that is the limit but then
20 somebody can always for an extension. So I am asking you to
21 take a realistic look now. Maybe I should ask defense
22 counsel. How long do you think you will need?

23 **MR. ZAVIN:** Your Honor, I think it realistically
24 may take more than the seven hours but certainly no more
25 than two days, probably less. But I would like latitude to

1 take two days since this is the prime deposition we are
2 taking. I think they have noticed 25 depositions. This is
3 basically our key deposition, at least at the moment.

4 **THE COURT:** That sounds reasonable to me. So we
5 will set this down for two days of deposition.

6 **MR. ZAVIN:** In terms of dates, Your Honor, might I
7 suggest the week of November 28th, because not only am I
8 available but I have every reason to believe that
9 plaintiff's counsel is available because they tried to
10 notice depositions of our people for three days that week,
11 the 29th, 30th and 31st. So I assume they are available
12 that week and I would suggest two days, either the 29th,
13 30th, or the 30th and December 1st.

14 **THE COURT:** How about that?

15 **MS. BROOKS:** Your Honor, yes, we did initially send
16 depositions or noticed depositions. The plaintiffs (sic)
17 told us that they could not do those dates and so I have a
18 mediation that I have to appear in the Southern District of
19 California on the 29th. And then I have a hearing on, it's
20 actually on December 2nd but it's in the Bay area, I have to
21 go out on the 1st. It is an all-day hearing.

22 That week is all chopped up unfortunately.

23 **THE COURT:** How are you on the other dates that she
24 mentioned?

25 **MR. ZAVIN:** Well, Ms. Brooks, what was the -- the

1 week of the 5th I'm out in California but what were the
2 second set of dates?

3 **MS. BROOKS:** The second set of dates, Your Honor,
4 would be any time that, the 14th or 15th or 16th of
5 December.

6 **MR. ZAVIN:** The 14th and 15th of December is
7 acceptable.

8 **THE COURT:** Okay, those are the two dates. The
9 14th and 15th is acceptable to both sides; is that right?

10 **MS. BROOKS:** Yes, Your Honor.

11 **THE COURT:** All right. Now, where will the
12 depositions take place?

13 **MR. ZAVIN:** At our local counsel's office in
14 Boston.

15 **THE COURT:** That is satisfactory to everybody,
16 everybody understands that?

17 **MS. BROOKS:** Yes, Your Honor.

18 **THE COURT:** All right. Now, as far as the other
19 matters that are brought up on the papers to me, I will make
20 some sort of disposition, which may be nothing more than to
21 defer any decision with respect to any sanctions or the like
22 until the case is over. That is one option.

23 I am certainly not going to rule from the bench now
24 on anything that has been presented to me. All right.

25 Now, what I suggest though is that you keep the

1 skirmishes to a minimum because I am going to be actively
2 overseeing your performance. If it appears to me that there
3 is more skirmish than there is discovery going on, then I am
4 going to bring you back and impose on you the obligation of
5 letting me appoint a discovery master. Which I could do now
6 except that I have some hope that the acrimony that has
7 existed up to this point can be set aside and you act as
8 very professionally as you did here speaking to me in my
9 courtroom.

10 Both sides, very professional presentation. And I
11 expect that is going to be the way you are going to conduct
12 the depositions.

13 Don't get me involved in your deposition. It will
14 not be a pleasant experience if you do.

15 Everybody understand that?

16 **MR. ZAVIN:** Thank you, Your Honor.

17 **MR. SHOPE:** Yes, Your Honor.

18 **MS. BROOKS:** Yes, Your Honor.

19 **THE COURT:** Anything else that I should take up at
20 this time?

21 **MS. BROOKS:** Your Honor, our only concern is that
22 the defendants' activities may resume then as Mr. Gordon's
23 deposition --

24 **THE COURT:** No, I want that to stop. Any reason
25 why you can't stop the investigations, whatever

1 investigations are going on?

2 **MR. ZAVIN:** Well, Your Honor, we already said we
3 stopped the, any observation of Mr. Gordon or any discussion
4 with his neighbors.

5 We want to reserve the right based on the
6 deposition of Mr. Gordon and what occurs to conduct
7 perfectly legal inquiry that may result.

8 **THE COURT:** You are talking about after the
9 deposition?

10 **MR. ZAVIN:** That's correct, Your Honor.

11 **THE COURT:** Oh, yes. No, I am talking about
12 between now and the deposition. Any reason --

13 **MR. ZAVIN:** Then, Your Honor, between now and his
14 deposition I will undertake that there will be no further
15 investigation.

16 **THE COURT:** All right. And after that, of course,
17 is wide open. You are certainly correct that you don't know
18 what you are going to learn at the deposition that may cause
19 you to want to take certain investigation. And that is true
20 with the plaintiff as well.

21 Anything else?

22 **MS. BROOKS:** Your Honor, the only other issue is
23 that we did notice the deposition of Mr. Katzenberg. He is
24 the gentleman to whom Mr. Gordon sent his submission and
25 which plaintiffs -- defendants admit that it was indeed

1 addressed to him and we simply got back that he's in Europe.

2 He is the CEO of DreamWorks. I'm afraid -- we may
3 as well while we are here before Your Honor perhaps set his
4 deposition date too so that we can lock that in.

5 **MR. ZAVIN:** Your Honor, he is the CEO of a very
6 large company. I don't know his schedule as I sit here. We
7 will work with --

8 **THE COURT:** Well, let's see if we can break it down
9 into pieces to help Mr. Katzenberg a little bit.

10 You want it to be after the deposition of your
11 client. Everybody agrees that Katzenberg will come after
12 the deposition of the plaintiff?

13 **MR. ZAVIN:** Yes, Your Honor.

14 **THE COURT:** All right. So we know it is not going
15 to happen before December, what are those dates again?

16 **MS. BROOKS:** 14th and 15th.

17 **MR. ZAVIN:** December 14th and 15th, Your Honor.

18 **THE COURT:** How long do you think you would need to
19 take his deposition? Is one day enough or do you need two
20 days?

21 **MS. BROOKS:** I think we should schedule two days
22 just in case, Your Honor.

23 **MR. ZAVIN:** Your Honor, the man is the CEO of a
24 large company who has got no involvement in this.

25 **THE COURT:** Then he will be out of there fast. And

1 I am not attempting to be frivolous when I say that. We
2 have a lot of CEOs from a lot of big companies and I am sure
3 that they all have the same attitude when --

4 **MR. ZAVIN:** But, Your Honor, the only --

5 **THE COURT:** -- called upon to come into court here.

6 **MR. ZAVIN:** The only claim --

7 **THE COURT:** Can I just finish?

8 **MR. ZAVIN:** Yes, Your Honor. I apologize.

9 **THE COURT:** We try to treat everybody the same. If
10 they want to take his deposition, they are entitled to take
11 his deposition so we have to pick a date for him.

12 **MR. ZAVIN:** Your Honor, I was not objecting to his
13 deposition being taken. I apologize if that was the
14 impression I gave. I was only objecting to this notion that
15 his deposition could possibly go more than the usual seven
16 hours.

17 The only claim is that he was sent a letter in
18 1999. That's the only --

19 **THE COURT:** It may well be. If you are correct, it
20 may -- I have heard these arguments before. And sometimes
21 what happens is the deposition is over in 15 minutes because
22 it turns out to be true what the assertion was, that the
23 deponent didn't know anything and so that became apparent in
24 15 minutes.

25 But the fact that we are going to pick a date or

1 give him a range of dates is not I don't think relevant to
2 your concern.

3 So sometime -- when do you want to take his
4 deposition? Sometime after the 1st of the year?

5 **MS. BROOKS:** I assume so, Your Honor, with the
6 holidays coming up, unless he might be available the week
7 between Christmas and New Year, but I certainly wouldn't
8 want to impose that on anyone if that is problematic.

9 So we'd ask as early in January as possible or
10 starting the third week of January. I have a trial
11 unfortunately from January 10th to 20th but I am available
12 before that or any time after that.

13 **THE COURT:** All right. What is the first working
14 day in January?

15 **THE CLERK:** January 3rd.

16 **THE COURT:** January 3rd. All right. So why don't
17 you suggest to him that he pick either the 3rd, the 4th or
18 the 5th. Is that the week?

19 **THE CLERK:** Tuesday, Wednesday and Thursday.

20 **THE COURT:** Tuesday, Wednesday, Thursday and/or
21 Friday, too, the 6th. We are just making those as
22 suggestions to him. If they are convenient, then it will be
23 a lock because it is convenient to the plaintiff as well.
24 And I think that he would appreciate just being given that
25 range. And we expect that it will be no longer than a day

1 but we are going to set aside two days just in the event
2 that more time is needed.

3 **MR. ZAVIN:** Your Honor, I will undertake to check
4 his schedule. And if he is available those days, we will
5 schedule it. If he is not, I will propose alternate dates.

6 **THE COURT:** Yes. Make sure that you come back with
7 an alternate.

8 **MR. ZAVIN:** I will absolutely propose alternate
9 dates to plaintiff's counsel.

10 **THE COURT:** All right. Anything else?

11 **MS. BROOKS:** Nothing on our behalf, Your Honor.
12 Thank you very much for your time.

13 **THE COURT:** Thank you very much, Everybody.

14 **MR. MADERA:** Your Honor, just one minor point, if I
15 may?

16 **THE COURT:** Go ahead.

17 **MR. MADERA:** At the scheduling conference you had
18 us list the various witnesses that we would need to conduct
19 depositions of. And we listed Michael Eisner who had been
20 the CEO of Disney. And you heard today the involvement of
21 Disney here.

22 I would need your permission, because you said no
23 other discovery absent permission of the Court --

24 **THE COURT:** Yes.

25 **MR. MADERA:** -- to be able to issue a subpoena

1 duces tecum to Disney for the documents which I did not
2 specifically list on that --

3 **THE COURT:** Yes, you can do that.

4 **MR. MADERA:** Okay. Thank you.

5 **THE COURT:** Okay.

6 Anything else?

7 **MR. ZAVIN:** No, Your Honor.

8 **THE COURT:** All right. Thanks, Everybody.

9 **VOICES:** Thank you.

10 **THE CLERK:** Court is in recess.

11 (WHEREUPON, the proceedings were recessed at 12:40
12 p.m.)

C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

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